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NOTES.

EXEMPTION FROM TAXATION AS PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.—Prior to the adoption of the Fourteenth Amendment, the only refuge which the federal Constitution offered to litigants seeking to protect tax exemptions from violation by State legislatures, lay in the "contract clause."[1] The Supreme Court early extended this provision to embrace legislative grants,[2] including, among others, grants of exemption from taxation, provided they were made upon good consideration.[3] When this was lacking, the grant was held to be a bounty, a mere gratuity, which might be abolished at the pleas-

[1]Property rights were then unprotected against State action so far as the federal Constitution was concerned, unless they were rights arising out of contract, see Railroad *v.* Nesbit (U. S. 1850) 10 How. 395; for as such they came within the scope of the "contract clause."

[2]Fletcher *v.* Peck (1810) 6 Cranch 87.

[3]Tucker *v.* Ferguson (1874) 22 Wall. 527; R. R. *v.* Supervisors (1876) 93 U. S. 595.

ure of the legislature,[4] unless it was contained in a corporate charter;[5] and even then if the right to alter, amend and repeal had been reserved, the State might violate the exemption at will.[6]

With these precedents well established, it is natural that litigants have refrained from testing the unknown merits of their claims under the Fourteenth Amendment, and the records do not reveal a case where the Fifth Amendment could have been invoked. What is property within these safeguards of human rights has never received exhaustive definition.[7] The Supreme Court has been satisfied to reach an ultimate determination of their scope by a gradual process of judicial inclusion and exclusion.[8] Therefore the status of any right as property is, in the absence of judicial fiat, freely open to speculation.

Certainly the common law would never have looked upon a right to be exempt from taxes as coming within any if its rather well-defined classes of property,[9] but the breadth of meaning given to that term in the course of judicial construction of the various property clauses of the Constitution, renders the classification of the common law useless as a criterion. Rights in land which the common lawyer knew as property have been gradually infringed to subserve the public welfare,[10] and, on the other hand, many intangible rights which he would have considered incapable of vindication by legal remedy, have been dignified with the name of property.[11] It has been suggested that the same considerations which determine the inviolability of an exemption under the contract clause should be decisive of its protection as property;[12] but the characteristics of this contract right render such a suggestion untenable. It is treated as a right purely personal to the grantee;[13] it does not attach to the land exempted, nor is it capable of alienation,[14] unless by express legislative provision,[15] for the State is

[4]Salt Co. *v.* East Saginaw (1871) 13 Wall. 373; Welch *v.* Cook (1878) 97 U. S. 541. Mere action in reliance upon the statute will not be held good consideration. Wis. & Mich. Ry. *v.* Powers (1903) 191 U. S. 379. The statutes are construed as narrowly as possible without violating the intention of the legislature, Church *v.* Phila. (1860) 24 How. 300.

[5]Humphrey *v.* Pegues (1872) 16 Wall. 244; Home *v.* Rouse (1869) 8 Wall. 430. In these cases, the precedent of Dartmouth College *v.* Woodward (1819) 4 Wheat. 518 precludes the court from holding that a grant of exemption in a corporate charter is *nudum pactum.*

[6]Greenwood *v.* Freight Co. (1881) 105 U. S. 13; Tomlinson *v.* Jessup (1872) 15 Wall. 454.

[7]See Scranton *v.* Wheeler (1900) 179 U. S. 141, 153; Black, Constitutional Law (3rd ed.) 217.

[8]McGehee, Due Process of Law, 155.

[9]See 3 Jenks, Digest of English Civil Law, Table of Contents. The term includes interests in land and chattels whether corporeal or incorporeal, legal or equitable, and choses in action.

[10]Ry. Co. *v.* Mass. (1907) 207 U. S. 79, 87; Camfield *v.* U. S. (1896) 167 U. S. 518.

[11]See 26 Harv. L. Rev. 14 and 15.

[12]Sedgwick, Statutory and Constitutional Law, 683-4.

[13]Morgan *v.* Louisiana (1876) 93 U. S. 217; C. & O. Ry. *v.* Miller (1884) 114 U. S. 176.

[14]Morgan *v.* Louisiana *supra;* Picard *v.* R. R. Co. (1889) 130 U. S. 637.

[15]L. & N. Ry. *v.* Palmes (1883) 109 U. S. 244. This case goes so far as to hold that even after one transfer has been expressly authorized, the exemption vests in the transferee, as it was in the transferor, a mere

too jealous of its sovereign rights to treat a dispensation from the taxing power as something which can be passed from hand to hand. It follows that the one definition of property which alone is vouchsafed in all the books—that anything of exchangeable value is property[16]—would exclude immunity from taxes, for it is not assignable. Even a more conclusive argument may be derived from the rule that on foreclosure of a lien on all the property of a party enjoying immunity from taxation, the exemption is not held to be property so as to be subjected to the satisfaction of the lien.[17] It would, then, seem a fairly safe conclusion that, in the ordinary case of tax exemption, the grantee of that privilege, finding the shelter of the contract clause not available, could not seek protection within the prohibition against depriving persons of property without due process of law.

The validity of this conclusion does not seem to be impaired by the holding that there is a taking of property, where the exemption has been granted in return for the surrender of valuable property, and the State, though repealing the exemption, retains the consideration;[18] for here the property taken is that which comprised the original consideration. The Supreme Court has now by its decision in *Choate* v. *Trapp* (1912) 32 Sup. Ct. Rep. 565, extended that prohibition to cover an attempt by Congress to exercise a similar power. The government, in consideration that an Indian tribe give up its common holding in a great body of land, allotted to each individual a stated acreage which, while held by the grantee, should be exempt from taxation. Congress repealed this exemption but retained the land taken. The Supreme Court held that the tax exemption was property, and that this repeal deprived the Indians of it without due process of law. The result reached seems on the facts to be defensible; for here, it is submitted, the property taken was not in fact the exemption, but rather the land in return for which the exemption was promised.[19] It is unjust and

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personal right. There has been only one case in which the exemption has been held to be inherently such that it attached to the land into whosesoever hands it may come. New Jersey *v.* Wilson (1812) 7 Cranch 164. Where of two railroads consolidating each has immunity, the consolidation is also immune. Tenn *v.* Whitworth (1886) 117 U. S. 139.

[16]Opinion of Swayne J. in Slaughter House Cases (1872) 16 Wall. 36, 127. Though this definition is contained in a dissenting opinion, it was on a subject on which all concurred. See *In re* Parrott (1880) 1 Fed. 481, 506.

[17]Wilson *v.* Gaines (1880) 103 U. S. 417.

[18]Railroad Co. *v.* St. Louis County (1900) 179 U. S. 302; Stearns *v.* Minn. (1900) 179 U. S. 223. In the former of these two cases the court held that the repeal of the statute impaired the obligation of a contract, but four judges, in a concurring opinion, held it a taking of property within the Fourteenth Amendment. In the latter case the same bench unanimously called it a taking of property, though the facts were practically identical with those in the former case. The principle seems on the facts of these cases to have been misapplied. The consideration for the exemption from a property tax was the payment of an income tax. When the exemption was repealed the income tax was retained. Since if the entire statute had been repealed the State would have had undoubted right to reimpose the income tax there seems no violence in reaching the same result directly.

[19]See Railroad Co. *v.* St. Louis County *supra*, and the concurring opinion of White, Harlan, Gray and McKenna JJ. in Stearns *v.* Minn. *supra*.

despotic that any Government should be able to deprive its citizens of their property under the guise of giving therefor a fair return which may later be retracted.

CONTINGENT REMAINDERS AND INHERITANCE TAXATION.—As an attribute of its sovereignty a State has undisputed power over testamentary disposition, and can therefore impose a tax upon inheritance, which is not considered a tax upon the property devised, but upon the right of succession under a will.[1] This power is however subject to the limitation that rights once accrued are immune from taxation subsequently imposed,[2] otherwise the tax would be upon the property and not upon the succession. Accordingly a vested remainder is clearly not subject to a tax imposed by subsequent legislation.[3] In the recent case of *In re Smith* (1912) 135 N. Y. Supp. 240, a tax imposed by a statute passed subsequently to the death of the testator, but before the termination of the life estate created by the will, was held to be inoperative upon a contingent remainder limited to persons not ascertained. The decision proceeds on the theory that the right of succession accrued when the will became effective, and necessarily involves an examination into the nature of a contingent remainder during the existence of the preceding particular estate.

It is probable that in the earlier days of the common law contingent remainders were unknown.[4] As soon, however, as it was realized that they took effect by way of succession from the feoffor, and not by way of interruption of the previous particular estate, leaving accordingly no gap in the seisin, they became a common form of future interest in land.[5] That they were established without being completely analyzed and understood, might be suspected from the indefinite theories advanced as to the *locus* of the inheritance prior to the vesting in possession of the remainder, which was variously regarded as in abeyance, *in nubibus* or *in gremio legis*.[6] Even when fully accepted the interest of a contingent remainderman was extremely shadowy and precarious, easily susceptible of destruction by a merger of the life estate with the

[1]Ross, Inheritance Taxation § 4; U. S. *v.* Perkins (1896) 163 U. S. 625; *In re* Macky (1909) 46 Colo. 79. The fact that the State may tax the right to inherit United States bonds clearly shows that the tax is imposed upon the right to succession, and not upon the property itself. Wallace *v.* Myers (1889) 38 Fed. 184.

[2]Matter of Seaman (1895) 147 N. Y. 69.

[3]Ross, Inheritance Taxation § 36. A statute expressly including vested interests as taxable is unconstitutional. Matter of Pell (1902) 171 N. Y. 48.

[4]Williams, Real Prop. (20th ed.) 346. This view has the sanction of Professor Gray, Perp. § 100.

[5]See article by Edward Jenks, 20 L. Q. Rev. 280. That the remainder takes effect not upon a condition, of which only the grantor or his heirs could take advantage, but is a limitation upon the particular estate, see Colthurst *v.* Bejushin (1550) Plow. 21, 31; 8 Bac. Abr. (Am. Ed.) 380 *et seq.* The first contingent remainder was probably recognized in 1431. Y. B. 9 Hen. VI., Trin. term, pl. 19. See Williams, Real Prop. (20th ed.) 347.

[6]See Fearne C. R. (10th ed.) 360-364; Carter *v.* Barnardiston (1718) 1 P. Wms. 505. The correct view would seem to be that a reversion remains in the feoffor, Fearne C. R. (10th ed.) 361, Gray, Perp. § 11, note 1, though the old view is maintained by eminent authority. See Gray, Perp. § 11, note 1 *supra*.